Supreme Court, U.S.
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No. 93-227

In The

Supreme Court of the United States

October Term, 1993

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition for Writ Of Certiorri To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

JEFFREY W. WARREN*
JOHN R. BUSH
WENDY V.E. ENGLAND
BUSH ROSS GARDNER WARREN & RUDY, P.A.
220 South Franklin Street
Tampa, FL 33602
(813) 224-9255

Attorneys for Respondent The Celotex Corporation

*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

First, Celotex does not agree with Wausau's statement of the question, whether a mandamus writ should issue to review "the merits of a bankruptcy court's order remanding an action to state court. . . . " Petition at (i).

This is because, in the adversary proceeding, the bankruptcy court will decide the claim or cause of action that Wausau removed from the state court.

Second, Wausau fails to satisfy the Court's stringent mandamus requirements under Sup.Ct.R. 20.

A related question is whether Wausau seeks mandamus, certiorari or both, it having apparently urged both remedies. Petition at title page, (i), 7, 11.

Celotex does not believe that any question is presented as to the Eleventh Circuit's refusal to hear Wausau's appeal or mandamus petition. 28 U.S.C. §1452(b). The same consideration applies here, the Court being without jurisdiction to consider certiorari. *Id.*

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BRIEF IN OPPOSITION

Respondent, The Celotex Corporation, opposes the issuance of a writ of certiorari or a writ of mandamus to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in the above-entitled case.

STATEMENT OF THE CASE

This is a case of two cases: 1) since 1979 Celotex has pursued an insurance coverage dispute against Wausau in state court; and 2) shortly after filing its Chapter 11 petition on October 12, 1990, Celotex commenced an adversary proceeding in the bankruptcy court as described by Wausau in its Statement of the Case. Petition at 3-4. By this adversary proceeding, Celotex seeks the same relief that it claimed in the state court action.

On November 27, 1991, the bankruptcy court remanded the 1979 state court action that Wausau had removed. Pet.App. at 6a-8a. This remand was "for the sole purpose of permitting the Honorable John G. Hodges to enter a written order on an already announced ruling on Celotex' Motion for Partial Summary Judgment" against Wausau in the state court action. Bankruptcy Court Order Granting Debtor's Motion for Order Modifying Stay to Allow Entry of Order Granting Celotex' Motion for Partial Summary Judgment ("Order Modifying Stay"), Cel.App. at 1a-2a. The state court cause of action remained stayed in all other respects. *Id.*

On January 9, 1992, the district court denied Wausau's motion for leave to appeal, *Petition at 5*, and later, upon Wausau's motion for relief or reconsideration, stated: "The Court has reviewed Wausau's motion and finds no reason to alter or amend the January 9 Order." Pet.App. at 13a.

ARGUMENT

I. Wausau's contentions are without substance.

In as much as the bankruptcy court has not yet entered its final order (as to which appellate review is available), Wausau's attempt to invoke the Court's jurisdiction is without merit. By remanding the state claim or cause of action, the bankruptcy court did not withdraw from deciding the merits of the case. Therefore, Wausau's posited appellate review issue is redundant. The bankruptcy court has retained jurisdiction over the dispute between Wausau and Celotex and will ultimately enter an order or orders resolving that dispute. If Wausau is unsuccessful in the bankruptcy court, two appellate tribunals are available for relief, the district court and the Eleventh Circuit.

Celotex' 1979 state court case against Wausau was removed to the bankruptcy court. Then, the bankruptcy judge made it possible for the state court judge to reduce to written order his announced decision on Celotex' motion for partial summary judgment. Order Modifying Stay, Cel.App. at 1a-2a. To accomplish that, it was necessary to remand the case.[1] That left the bankruptcy court with Celotex' adversary proceeding, which includes a cause of action which is substantively identical with the removed/remanded state court action.

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[1] The point is self evident: the important order was the bankruptcy court's Order Modifying Stay, Cel.App. at 1a, but because Wausau had removed the state court case, the bankruptcy judge found it also necessary to remand so that the state court judge would have a case within which to enter his partial summary judgment order.

While it is not necessary to speculate about Wausau's motive in removing the state court case at a time prior to the judge's entering a written order on a previously announced partial summary judgment ruling, it is correct to say that the cause of action which is at the core of *each* case will be heard by the bankruptcy court. Stated somewhat differently, Wausau's appeal of the remand order to the district court, its motion for reconsideration in the district court, and its subsequent appeal to the Eleventh Circuit has not been a productive, substantive or meaningful course, precisely for the reason that its removed case is "dormant" in the state court. Because, as Wausau writes, Celotex obtained the stay provided by the October 17th Order with the view of centralizing all disputes in the bankruptcy court. Petition at 3.

On January 9, 1992, the district court denied Wausau's appeal, treating it as interlocutory, and declined to give Wausau leave to appeal the bankruptcy court's remand order because it did not involve "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order would not materially advance the ultimate termination of this litigation. . . . " (citing 28 U.S.C. § 1292(b)). Pet.App. at 4a. On August 27, 1992, the district court revisited Wausau's contentions, again declining to grant an appeal, observing in footnote 3: "The stay order, entered pursuant to § 105 of the Bankruptcy Code, specifically provided that the stay should otherwise remain in effect [as to the 1979 state court cause of action]. . . . " Pet.App. at 13a.

II. Wausau has not shown any basis for extraordinary writ relief.

A. Mandamus

The writ of mandamus has been used only to confine an inferior court to the lawful exercise of its jurisdiction or to compel it to act when it has a duty to do so. *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26 (1943). Even then, the writ will issue only after the petitioner has demonstrated a clear abuse of discretion or conduct amounting to "usurpation of [the judicial] power." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989).

The remaining two requirements for mandamus are, first, the absence of adequate means to obtain the relief that petitioner seeks, primarily the lack of a remedy by direct appeal, *Mallard*, 490 U.S. at 309; *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam). Second, petitioner must satisfy "the burden of showing that his right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

Viewing these authorities, and utilizing common sense, Wausau will have the right to appeal whatever adverse judgment the bankruptcy court might enter. An "appeal" (for which mandamus may not be substituted, *Bankers Life*, 346 U.S. at 383) of the remand order at this stage (assuming *arguendo* that the district court did not afford that right) would be meaningless: as we understand Wausau's argument here, it seeks a writ compelling the district court to hear its appeal of a remand order

(that the bankruptcy court judge entered to facilitate the court's *Order Modifying Stay, Cel.App. at 1a*) whereby the state court judge is limited to entering a partial summary judgment, and under circumstances wherein the bankruptcy court will try the cause of action that Wausau removed to the bankruptcy court. After the bankruptcy court has concluded its consideration of the Celotex adversary proceeding against Wausau, and assuming that Wausau believes that error has been committed, or that the findings are clearly erroneous, it is entitled to take its appeal to the district court and, if still dissatisfied, to the Eleventh Circuit.

B. Supreme Court Rule 20.1

Wausau is not entitled to a writ of mandamus because it has not shown that such will be in aid of the Court's appellate jurisdiction, or that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, or that adequate relief cannot be obtained in any other form or from any other court.

Although Wausau ignores the distinctions between mandamus and certiorari, 28 U.S.C. 1452(b) eliminates any possibility of certiorari review here. Pet.App. at 17a.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JEFFREY W. WARREN
JOHN R. BUSH
WENDY V.E. ENGLAND
BUSH ROSS GARDNER WARREN
& RUDY, P. A.
220 South Franklin Street
Tampa, FL 33602
(813) 224-9255

Attorneys for Respondent
The Celotex Corporation

APPENDIX

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: THE CELOTEX CORPORATION, et al., Debtors. _____/	Chapter 11 Consolidated Case Nos. 90-10016-8B1 and 90-10017-8B1

ORDER GRANTING DEBTOR'S MOTION FOR ORDER MODIFYING STAY TO ALLOW ENTRY OF ORDER GRANTING CELOTEX' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was presented to the Court on October 25, 1991, to consider the Motion for Order Modifying Stay to Allow Entry of Order Granting Celotex' Motion for Partial Summary Judgment (the "Motion") filed by the Debtor, The Celotex Corporation. Present at the hearing was Jeffrey W. Warren, Esq. and Charles P. Schropp, Esq. for the Debtors and Ronald L. Cohen, Esq., Rolf E. Gilbertson and Paul L. Gingras, Esq. for Employers Insurance of Wausau, and numerous other parties. The Court, having considered the Motion and the record in (a) the Debtors' bankruptcy cases, (b) the Debtors' Omnibus Insurance Adversary, and (c) the state court litigation related to the Motion, as well as having considered the memoranda of the parties relating to the Motion and arguments of counsel, and being otherwise fully advised in the premises, determines that the Motion should be granted. Accordingly, it is

ORDERED as follows:

1. The stay created by this Court's Order Granting Emergency Motion for Determination of Applicability of

§362 Stay to Pending Matters Or, In the Alternative, For Extension of §362 Stay to Pending Matters entered on October 17, 1990 (the §105 Stay Order) is modified for the sole purpose of permitting the Honorable John G. Hodges to enter a written ruling on Celotex' Motion for Partial Summary Judgment as to Employers Insurance of Wausau in the state court case styled *The Celotex Corporation, Plaintiff v. Aetna Casualty & Surety Co., et al. Defendants*, Case No. 79-5885, pending in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (the "Hillsborough Action).

2. Except as provided in this Order, the stay of all matters involving the Debtors pursuant to 11 U.S.C. §362 and the express §105 Stay Order will continue to apply to all pending matters involving the Debtors, including the Hillsborough Action, until this Court enters a specific order modifying the stay as to that matter.

DONE AND ORDERED at Tampa, Florida this 27 day of Nov., 1991.

/s/ Thomas E. Baynes, Jr.
THOMAS E. BAYNES, JR.
UNITED STATES
BANKRUPTCY JUDGE

cc: Debtors
Jeffrey W. Warren, Esq.
Charles P. Schropp, Esq.
Ronald L. Cohen, Esq.
Rolf E. Gilbertson, Esq.
Paul L. Gingras, Esq.
Core Service Group by Counsel for the Debtors